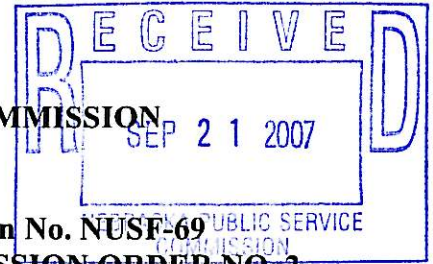


BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION



IN THE MATTER OF THE NEBRASKA)
PUBLIC SERVICE COMMISSION, ON)
ITS OWN MOTION, SEEKING TO)
IMPLEMENT POLICIES AND)
PROCEDURES RELATED TO PROVIDING)
DEDICATED UNIVERSAL SERVICE)
SUPPORT FOR WIRELESS)
TELECOMMUNICATIONS SERVICES.)

Application No. NUSF-69
PROGRESSION ORDER NO. 2

COMMENTS OF N.E. COLORADO CELLULAR, INC.
d/b/a VIAERO WIRELESS

N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless (“**Viaero**”) by counsel and pursuant to the Nebraska Public Service Commission’s (the “**Commission**”) Order Seeking Comment entered July 24, 2007 in the above-captioned proceeding (the “**Order**”) hereby respectfully submits the following Comments:

I.

INTRODUCTION

Viaero is a commercial mobile radio server (“**CMRS**”) provider in Nebraska and Colorado. In Nebraska, Viaero is authorized by the Federal Communications Commission (“**FCC**”) to serve roughly two-thirds of the State’s western geographic area. Viaero was designated an eligible telecommunications carrier (“**ETC**”) by the Commission in Application C-3324 on October 18, 2005, which has enabled Viaero to access federal high-cost support to aggressively construct new wireless infrastructure in its authorized service territory in the State. Viaero has previously submitted Comments in NUSF-48/PI-104 and has submitted testimony before the Nebraska Legislature urging the Commission to develop and implement a program for distribution of Nebraska universal service fund support (“**NUSF Support**”) to wireless carriers

serving high-cost areas of the State in an efficient, competitively neutral basis. Viaero lauds the Commission for initiating this Docket in furtherance of that objective.

The overriding purpose of the universal service system is to extend telecommunications infrastructure out to rural America so that services, choices, and affordable prices are made available to rural consumers. By initiating this Docket the Commission has determined that consumers in rural and high-cost areas should not be limited to accessing the fixed wireline network, a position which is in accord with the Telecommunications Act of 1996 (“Act”), wherein Congress commanded the FCC to allow any carrier of any technology that provides the supported services required under the Act to have access to universal service funds.¹ Congress went so far as to require all state universal service rules to be competitively neutral to prevent discrimination against new entrants to the marketplace.² Furthermore, the FCC adopted competitive neutrality as a core universal service principle.³

The Act brought forth a new era of competition for services that Congress determined should be available in “all telecommunications markets.”⁴ The universal service provisions adopted by Congress and the FCC do not protect any class of carrier or any individual company. As the United States Court of Appeals for the Fifth Circuit properly ruled:

¹ 47 U.S.C. Section 214.

² 47 U.S.C. Section 253(a), (b) (“No State of local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. [. . .] Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public interest and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”)

³ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8801-02 (1997) (“*First Report and Order*”) (“Our decisions here are intended to minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier. We conclude that competitively neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers.”).

⁴ See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. At 113.

The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well (emphasis in original).⁵

As a fundamental principle in this proceeding, the Commission should follow the directive handed down by Congress in Section 253 of the Act and adopt competitively neutral rules for distribution of NUSF Support so that no carrier or class of carrier is favored, or disfavored, by the rules.

II.

SHOULD THE COMMISSION SUPPORT A SINGLE NETC WIRELESS PROVIDER NETWORK?

Limiting participation and access to NUSF support to a single wireless NETC would not be in the public interest and would, in fact, stifle competition and innovation by limiting the incentives to invest in innovative wireless technologies and service. In effect, limiting NUSF support to a single wireless NETC would be promoting the development of a new monopoly in the provision of wireless service in rural and high-cost areas when the objective of state and federal law and public policy is to promote and foster competition as a means of enhancing access to innovative technologies and efficient low cost service.⁶

In a state-created wireless monopoly environment, consumers in rural and high-cost areas would not likely have access to the best network, facilities, services and technologies. There is simply too much variation in the facilities utilized by wireless carriers to expect that a single provider system would adequately serve the public interest. In the wireless marketplace, where

⁵ *Alenco, et al., v. FCC*, 201 F.3d 608, 620 (2000).

⁶ *In the matter of Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934, Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231 (2000) (“A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant.”)

there are significant differences in technology and network development, consumers will benefit most from choice and the resulting competition will yield better and lower cost services.

Further, the Act requires that any carrier, using any technology that provides certain specific supported Services, may be designated as an ETC for purposes of receiving federal high-cost support..⁷ The Act went on to require all state universal service rules to be competitively neutral to prevent discrimination to newcomers.⁸

In sum, the universal service provisions adopted by Congress under the Act do not protect any class of carriers or any single, individual company. In an era of burgeoning competition, the public policy of the State of Nebraska should not be to create a monopoly for the provision of wireless service in rural and high-cost areas of the State.

III.

SHOULD REVERSE AUCTIONS BE USED FOR THE DISTRIBUTION OF NUSF SUPPORT IN RURAL AND HIGH COST AREAS?

The use of “reverse auctions” would not promote the development of a comprehensive wireless network capable of providing adequate service to high-cost and rural areas in the State of Nebraska. The adoption of a reverse auction structure would, by definition, lead to a “race to the bottom” in terms of network and facility quality. A reverse auction provides incentive only to constrict the least amount of facilities and to provide the least required service and customer support in order to win and maintain support levels. Consequently, the reverse auction, by its very nature, seeks to encourage only the least possible capital investment in network and infrastructure development and customer services rather than a comprehensive and robust network system with incentives to provide innovative technology and wireless service

⁷ 47 U.S.C. § 214.

⁸ 47 U.S.C. § 253.

comparable to those services provided to consumers in urban areas, which is a basic objective of the Nebraska Telecommunications Universal Service Fund Act.⁹

Further, a reverse auction procedure would require extensive rules concerning facility standards and network quality, which would serve to undermine and stifle any deviation from the basic wireless network structure in the pursuit of innovation and efficiency. Most reverse auction programs lead to a single winner, effectively resurrecting the pre-Act era, where a single carrier receives all the support and competitors find it impossible to enter the marketplace and compete. This is precisely the situation Congress sought to eliminate under the Act by requiring competitive carriers to be designated as Eligible Telecommunications Carriers (“ETCs”). Rather than promoting a “monopoly” system which is contrary to stated public policy at both the state and federal level, the Commission should be encouraging competition in rural and high-cost areas so that consumers can choose the service that best suits their needs and carriers are forced to compete and deliver benefits or risk losing customers. The preferred system of allocating NUSF support has the support following the consumer, and the consumer choosing the network and carrier that provides the best service. If a reverse auction proposal is adopted, then the only competitively neutral means of doing so is to place all carriers of all technologies (including wireline carriers) into the auction, to ensure that consumers receive services from those carriers who can deliver them most efficiently.

IV.

HOW SHOULD THE COMMISSION DETERMINE WHICH AREAS ARE HIGH-COST ELIGIBLE FOR NUSF SUPPORT?

Over the past several years, the Commission has undertaken an exhaustive analysis of how best to allocate wireless NUSF Support in NUSF-26, NUSF-50 and C-3554/PI-112. In

⁹ Neb. Rev. Stat. § 86-1404(3).

these Dockets, the Commission has concluded that NUSF Support allocation mechanisms must target “high-cost” areas rather than the more general “rural” area designation.

In its Findings and Conclusions in NUSF-26, entered November 3, 2004 (the “**NUSF-26 Order**”), the Commission revised the universal service funding mechanism which it had established in C-1628. (See Application No. C-1628, Findings and Conclusions, entered January 13, 1999). The Commission found that affordable access to telecommunications and information services at comparable rates is key in developing a long term universal service mechanism and that access to such services should be affordable and comparable in rural and urban areas. The Commission further found that NUSF should not reward inefficient investment. However, in order to keep local rates affordable, the Commission determined that a new methodology for calculating support was necessary so that NUSF Support would be targeted to the most costly and sparsely populated “out-of-town” service areas where NUSF support is most needed. (See NUSF-26, Paragraph 11).

The Commission’s methodology under the NUSF-26 Order is equally applicable to the distribution of NUSF Support for the development of wireless infrastructure. The Commission’s findings in the NUSF-26 Order stated that average loop cost is a function of population density – the higher the density the lower the loop cost. Therefore, the Commission adopted an “in-town” and “out-of-town” support mechanism which targeted NUSF wireline support to those areas of the state with the lowest density and the highest loop cost. (NUSF-26, Paragraph 11). This mechanism for determining high-cost areas has been incorporated into the Commission’s recent Staff Proposal in NUSF-50, Progression Order No. 3/C-3554, wherein the Commission is seeking to coordinate various aspects of its NUSF support allocation mechanism, including its support porting methodology. (See Application No. NUSF-50, Progression Order No. 3/C-

3554/PI-112, Order Releasing Staff Proposal, entered February 13, 2007.) The Commission's fundamental objective in these Dockets was to target NUSF support to sparsely populated out-of-town areas where NUSF support is most needed. Having already established a methodology for identifying high-cost areas which need NUSF support, the Commission should utilize the same areas in allocating support for the deployment of wireless infrastructure. To embrace another methodology would undermine the Commission's carefully developed findings concerning high-cost areas which need specific and targeted NUSF support. It is precisely those areas with lowest population density and highest loop costs which can benefit most from the deployment of innovative wireless technology.

The Commission should not engage in the process of evaluating geographic characteristics in determining whether a particular geographic area is high-cost. First, such an evaluation is not currently within the administrative expertise of Commission Staff. Second, the challenges of unique geographic characteristics, whether urban or rural, should be exclusively the province of the engineering and technical expertise of individual carriers. What may constitute a "unique geographic barrier" to one carrier may not be a barrier to another carrier due to network design or other technological issues. The Commission has determined that the single most relevant factor impacting the identification of high-cost areas is population density. Therefore, the Commission's methodology utilizing that factor should be utilized in the development of the Commission's dedicated wireless fund as well.

V.

**SHOULD THE COMMISSION CONSIDER THE TYPE
OF WIRELESS TECHNOLOGY BEING DEPLOYED
IN DETERMINING APPROPRIATE ALLOCATION OF NUSF SUPPORT?**

As previously stated, the Commission's dedicated wireless NSUF program must be competitively neutral, and not disadvantage any class of carriers based on technology. Whatever the Commission does, it must not embrace a set of rules that insulates or favors one class of carriers or another based on technology. NUSF Funds are for consumers, not carriers, and it does not matter which carrier gets the support as long as consumers have access to the support service.


Further, the Commission is not in a position to "select" one specific technology over another to provide services. The Commission's role is not to act as an "arbiter" of technology choices; that decision can only be made by the marketplace by allowing consumers to select the best available product for their needs. "Freezing" the nature of technology available to consumers would certainly not be in the public interest and would thwart the development and deployment of innovative products and services.

Collocation incentives should be examined very carefully. Carriers generally have an existing economic incentive to collocate. However, network design and cell tower location standards and requirements vary widely by carrier and technology, so collocation is not always technology feasible or desirable even if an additional economic incentive exists. Therefore, any economic incentive would have to be subject to overriding technology, engineering and network design requirements for all carriers involved. Certainly, the Commission would need to carefully explore this topic to be certain that collocation incentives would not economically or

technologically burden either the tower owner/operator or the competitive carrier seeking collocation.

Respectfully submitted this 21st day of September, 2007.

**N.E. COLORADO CELLULAR, INC.,
d/b/a VIAERO WIRELESS**

By 
Loel P. Brooks, #15352
BROOKS, PANSING BROOKS, PC, LLO
1248 "O" Street, Suite 984
Lincoln, NE 68508-1424

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st of September, 2007, an original, five copies and an electronic copy of the Comments of N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless, in Application No. NUSF-69 were hand delivered to:

John Burvainis
Acting Executive Director
Nebraska Public Service Commission
1200 "N" Street, Suite 300
Lincoln, NE 68509-4927

Jeff Pursley, Director
Nebraska Universal Service Fund
Nebraska Public Service Commission
1200 "N" Street, Suite 300
Lincoln, NE 68509-4927

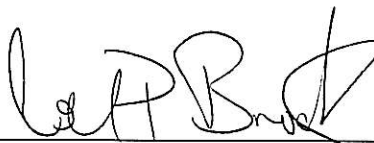
and a true and correct copy of the Comments of Mobius Communications Company in Application No. NUSF-69, Progression Order No. 2 were sent by electronic mail and by regular U.S. mail on the 21st day of September, 2007, addressed as shown below to the following:

Jill Vinjamuri-Gettman
Gettman & Mills LLP
10250 Regency Circle, Suite 200
Omaha, NE 68114
jgettman@gettmanmills.com

Timothy J. Goodwin
Qwest Services Corporation
1801 California, Ste. 1000
Denver, CO 80202
Tim.goodwin@qwest.com

Jack L. Shultz
Harding & Shultz, P.C., LLP
800 Lincoln Square
121 S. 13th Street
Lincoln, NE 68501-2028
jshultz@hslegalfirm.com

Paul M. Schudel
James A. Overcash
Woods & Aitken, LLP
301 South 13th St., Suite 500
Lincoln, NE 68508
pschudel@woodsaitken.com
jovercash@woodsaitken.com



Loel P. Brooks